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I. INTRODUCTION

In the past fifteen years, the United States Supreme Court has sharply limited fifth amendment protections against compelled production of papers.[1] Under the reasoning of these cases, the contents of private papers are not protected by the privilege against self-incrimination. In England, on the other hand, the state may not compel production of self-incriminating evidence in a criminal case. This Note will trace the history of the English privilege. It will analyze the interests protected by the English rule and will compare the English system to that of the United States. The comparison of the English and American systems will be especially fruitful because the opposite approaches taken by the two countries are rooted in a common history. This Note will also analyze whether current American law provides adequate protection against compelled production of private papers by subpoena duces tecum. Finally, this Note will suggest an alternative to the current American system.

The English protection against self-incrimination is deeply rooted in a long history of oppression.[2] An understanding of the privilege and the evils against which it protects cannot be understood fully without an understanding of its historical context. Accordingly, this Note will trace the history of the privilege from its origins in the thirteenth century to its establishment in the seventeenth and eighteenth centuries. This Note will show that, under English law, the privilege serves two interests. The

1. *See, e.g.*, United States v. Doe, 465 U.S. 605 (1984); Fisher v. United States, 425 U.S. 391 (1976).

2. The privilege originated in the infamous heresy trials which began in the latter part of the fourteenth century and continued over a span of over two and a half centuries. *See infra* notes 20-45 and accompanying text.

first is the cruelty interest commonly associated with the privilege—the right to be free from being forced to answer questions which will be used against the witness in a criminal proceeding. The second interest is the right not to have one's privacy violated by being forced to answer self-incriminating questions or divulge self-incriminating private matters, or by being forced to produce self-incriminating personal documents. Although the English courts have not distinguished between these interests, they are protected by the broad rule of evidence that prohibits compelling self-incriminating testimony and production of evidence.

The United States privilege has evolved from the same history as the English privilege. This Note will trace the development of the American form of the privilege, beginning with an analysis of the drafting of the fifth amendment.[3] Since the drafting of the fifth amendment and the first decision interpreting the amendment,[4] the Supreme Court has pared away at the privilege. Most recently, the Supreme Court held that individuals are protected only against having to give self-incriminating "testimony" which is later used against them in criminal prosecutions.[5] This rule leaves unprotected tax records of a sole proprietorship and arguably, even an individual's most private papers, including diaries, letters, and other personal writings.

Compelled production of documents also involves the fourth amendment.[6] This Note will analyze the specific fourth amendment safeguards which surround the issuance and enforcement of subpoenas to produce documents. This Note will conclude by arguing that, because the Court has sharply limited fifth amendment privacy protections, the privacy interest is better protected by the fourth amendment.

II. DEVELOPMENT OF THE PRIVILEGE AGAINST SELF-INCRIMINATION IN ENGLAND

Although the authorities do not agree why the first protections originated, it is settled that the privilege against self-incrimination was an integral part of English common law before the end of the seventeenth century.[7] Although begun as a privilege applicable to forced oral testi-

3. *See infra* text accompanying notes 72-93.

4. Boyd v. United States, 116 U.S. 616 (1886). *See infra* text accompanying notes 94-112.

5. *Doe*, 465 U.S. at 605.

6. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), *cited with approval in* Fisher v. United States, 425 U.S. 391, 401 (1976).

7. *See infra* text accompanying notes 50-58.

mony,[8] by the second half of the eighteenth century the scope of the privilege included not only oral testimony, but also the production of tangible evidence which was self-incriminating.[9] In order to understand the privilege as it now exists, this Note will explore this history.

A. The Privilege Against Self-Incrimination in the Ecclesiastical Courts

1. The Oath *Ex Officio*

Sometime prior to the year 1076, separate ecclesiastical courts[10] were established. Commentators agree that the roots of the privilege are found in the opposition to the oath *ex officio*[11] administered by these ecclesiastical courts.[12] Generally, these courts used an inquisitorial system whereby witnesses were subject to questioning by the ecclesiastical authority, who wished to use their testimony to obtain evidence to be used against the witnesses themselves. The witnesses were subject to this questioning even though formal charges had not been brought against them. Witnesses were required to swear to answer all questions and to answer them truthfully. The church formally sanctioned the oath in the Constitution of Otho[13] and in the Constitution of Bonifice.[14]

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8. *See infra* text accompanying notes 31-63.

9. *See infra* note 63.

10. Bishops presided over these courts, which had jurisdiction over alleged spiritual matters such as marriages, wills, the correction of sinners, church properties, offenses against religion, heresy, atheism, blasphemy, sacrilege, witchcraft, perjury, profanity, schism, failure to attend church, and violation of the sabbath. Another area of jurisdiction included "sins of the flesh" such as fornication, adultery, incest, procuring, and bigamy. L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 43-44 (1968).

11. *Ex officio* means the oath was given to a witness by the ecclesiastical authority whose power to do so was derived solely by virtue of his ecclesiastical office. For a definition of the oath, see *infra* notes 12-14 and accompanying text.

12. 8 J. WIGMORE, EVIDENCE § 2250, at 267, 270-84 (McNaughton rev. 1961); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949). Wigmore argues that the opposition was primarily a jurisdictional struggle between the ecclesiastical courts and common law courts. 8 J. WIGMORE, *supra*, § 2250, at 269. For purposes of this Note, the importance of these events concerns the parameters of the objection to self-incrimination and not whether the original objection was jurisdictional.

13. The Constitution of Otho of 1236 provided:

> We do decree that the oath of calumny, by which the truth is more easily discovered, and causes finished with greater celerity, shall in future be administered throughout the kingdom of England in causes of an ecclesiastical and civil nature; according to the canons in that behalf, notwithstanding any custom to the contrary.

8 J. WIGMORE, *supra* note 12, § 2250, at 270 n.6 (citing translation in WHITE, THE CONSTITUTIONS OF OTHO (1844)). The oath of calumny provided that during interrogation, witnesses could not deny what they believed to be true. *Id.*

14. The Constitution of Bonifice, adopted in 1272, provided:

> We establish that, when the prelates and ecclesiastical judges inquire the faults and

It was in this context that the issue of self-incrimination was conceived. At this early stage the question regarded the procedure whereby witnesses could be put to oath. The ecclesiastical courts could call witnesses who might not have been charged and require them to take the oath. Although prosecution could not begin until there was a "presentment,"[15] this requirement could be met by a statement of the prosecuting authority, an official complaint, or by the testimony of the witnesses.[16] It was the practice of having witnesses serve as their first accusers which was seen as offensive. This could occur when witnesses who testified were not charged with a crime. The ecclesiastical authority was able to question uncharged suspects in an effort to extract confessions or other evidence which would serve as the presentment, since the oath required witnesses to swear to answer all questions and to answer them truthfully. Witnesses were unable to confront their accusors or know of the evidence against them.[17]

The ecclesiastical procedure demonstrates the two interests involved in many cases in which compelled testimony is used. First, evidence obtained from witnesses was used to criminally indict them—a result initally seen as cruelty. Second, since private evidence was coerced from witnesses, their interest in privacy was violated, even if the evidence was not used against them in court.[18] The ecclesiastical courts were the only courts of their day to utilize the oath procedure.[19] Ironically, these courts

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excesses of their subjects that deserve punishment, the lay be compelled if need require by sentences of excommunication to give an oath to say the truth; and if any withstand or let this oath to be given, he shall be bridled with the sentence of excommunication and interdiction.

8 J. WIGMORE, *supra* note 12, § 2250, at 270 n.7 (citing translation in BULLARD & BELL, LYNDWOOD'S PROVINCIALE 44 (1929)).

15. The presentment (or *inquisitio*) was a preliminary condition requiring probable grounds of "infamy or bad reputation." This condition could be established by "the existence of either notorious suspicion (*clamosa insinuatio*) or common report (*fama*) (which was some sort of public rumor)." L. LEVY, *supra* note 10, at 23.

16. 8 J. WIGMORE, *supra* note 12, § 2250, at 275.

17. L. LEVY, *supra* note 10, at 47.

18. The privacy interest is demonstrated further by the objection to the use of one's coerced testimony against others. For example, in some cases the ecclesiastical authority would, in Levy's words,

> [compel] the husband to confess his heresy and then to implicate his wife. She was forced to confirm his guilt, to admit to her own, and betray her children. In succession each member of the family was put to the oath and examined, so that father accused son, the son his sister, the children their parents, and friends their neighbors.

L. LEVY, *supra* note 10, at 61. In cases such as this, the distinction of the two interests is even more clear, because the compelling of self-incriminating testimony is only a part of the objectionable conduct by the ecclesiastical authority.

19. *Id.* at 280-82.

were the forum where privacy concerns seemed to be the greatest; their inquisitions were into moral matters and matters of conscience.

2. The Oath *Ex Officio* in Heresy Trials

The manner in which the the oath *ex officio* was used in heresy[20] inquisitions inspired the development of the privilege against self-incrimination as we know it. In 1401, Parliament enacted a statute called *De Haeretico Comburendo*,[21] which prohibited heretical preaching and authorized the bishops to arrest any person suspected of heresy.[22] The Statute authorized the burning of heretics.[23] Use of the oath *ex officio* in these cases was a general practice.[24] From 1401 until 1534 (when the Act was repealed) approximately fifty individuals were burned as heretics.[25] Thousands were persecuted in other ways for their religious beliefs.[26] Even the repeal of the Act did not end the persecution, which continued unabated for another century. Understandably, the oath came to be the focus of popular resentment, because it was the use of the oath which brought to light the private beliefs and practices of witnesses.[27] Early opposition to the oath, however, was grounded in little more than strained biblical interpretation[28] and terrifying accounts of martyrdom in

20. The importance of eradicating heresies, or "errors of faith," *id.* at 21, is illustrated by the following quote:

> England was a devout Catholic nation in an age that was absolutely convinced of the duty of the state to support the Church's infallible judgments on spiritual matters. The state was responsible, as a partner of the Church, for the souls of its subjects and was obliged to protect them against heresy; its existence threatened eternal damnation for all who were victims of its contagion. There was one fixed body of revealed and absolute truth. To suffer deviations to exist was thought to reflect doubt on the purity of the faith and the sincerity of the convictions of true believers. Moreover, any sovereign who did not bid the command of the Church on matters of faith might expose himself to be condemned as a heretic, suffer excommunication, and expose his nation to interdiction.

Id. at 54.

21. *De Haeretico Comburendo* means "the act for the burning of heretics." *Id.* at 57 (citing J.F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 443 (1883)).

22. L. LEVY, *supra* note 10, at 58-59.

23. *Id.* at 57.

24. *Id.* at 59.

25. *Id.* at 60.

26. *Id.*

27. *See supra* note 18.

28. The following passage was often used by those opposed to the oath:

> Again, ye have heard that it hath been said by them of old time, Thou shalt not forswear thyself, but shalt perform unto the Lord thine oaths: But I say unto you, Swear not at all; neither by heaven; for it is God's throne: Nor by earth; for it is his footstool: neither by Jerusalem; for it is the city of the great King. Neither shalt thou swear by thy head, because thou canst not make one hair white or black. But let

the face of the oath.[29]

One of the first official recognitions of these concerns was an act promulgated by Henry VIII in 1533[30] that required two witnesses to accuse an individual of heresy before he or she could be arrested. The Act indicates the scope of the objections to the oath at that early stage. Since the statute did not prohibit compelled self-incrimination, the public complaints concerned only the practice of questioning witnesses before they were charged with crimes.

3. Establishment of the Modern Privilege

It was not until the middle of the seventeenth century that the privilege began to look like its twentieth century incarnation. During this time the High Commission[31] sought to force conformity with Anglican Church rituals and ceremonies. The Commission often acted *ex officio*, assuming the role of accuser, prosecutor, judge, and jury.[32] What was especially noxious about the Commission was its use of the oath to compel evidence of the witness' conscience. It was in this context that John Lilburn, the man most responsible for the development of the privilege, focused attention upon the use of the oath.

Lilburn was first tried for shipping seditious books into England from Holland.[33] He was accused by two of his coworkers, but claimed innocence.[34] Prior to his trial, the attorney general's chief clerk questioned him about the acts of other individuals. Lilburn claimed that

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your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil.

Matthew 5:33-37 (King James). This passage is from a discourse known as the Sermon on the Mount. It may have been directed at those who, because of the sanctity of oaths, felt that ordinary phrasing need not be truthful.

29. *See generally*, J. FOX, THE ACTS AND MONUMENTS OF JOHN FOX: A NEW AND COMPLETE EDITION (S. Cattley ed. 1837-41).

30. An Act for Punnysshement of Heresye (1533), *quoted in Morgan, supra* note 12, at 6.

31. The High Commission had its origin in the commission established by Queen Mary in 1557. Before 1557 various commissions were established to enforce the official religion. These commissions operated through the old ecclesiastical courts. In 1557, however, Queen Mary established a new commission to supersede the others "for a severer way of proceeding against heretics." L. LEVY, *supra* note 10, at 76. In its time, this body became the Court of the High Commission, an ecclesiastical arm of the Privy Council and the Star Chamber. *Id.* at 76.

32. *Id.* at 268.

33. Trial of Lilburn and Wharton, In the Star Chamber, Y.B. 13 Car. I, pl. 148 (1637), *reprinted in* 3 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS 1315 (1809).

34. Levy points out that "Lilburn's guilt seemed certain because two of his confederates had accused him in order to save themselves. One of them had made his accusations by sworn affidavit . . . . All that was needed were the confessions of Lilburn and [his accomplice]." L. LEVY, *supra* note 10, at 273.

these questions were not germane to his charge and refused to answer them. Lilburn argued:

> I am not imprisoned for knowing and talking with such and such men, but for sending over Books; and therefore I am not willing to answer you to any more of these questions, because I see you go about this Examination to ensnare me: for seeing the things for which I am imprisoned cannot be proved against me, you will get other matter out of my examination: and therefore if you will not ask me about the thing laid to my charge, I shall answer no more . . . .[35]

Lilburn's objection was similar to those of earlier critics; the attorney general sought information concerning matters for which Lilburn was not charged. As to the matter for which he was charged, Lilburn claimed no privilege against self-incrimination. He merely claimed innocence.[36] Two weeks later Lilburn appeared before the Star Chamber where he refused to swear to answer truthfully all questions asked of him before being charged with specific crimes.[37] Lilburn was returned to prison.[38] Approximately two months after his arrest, Lilburn was brought before the Star Chamber, where he again refused to take the oath.[39] The court returned Lilburn to prison and placed him in solitary confinement.[40] At his trial a week later Lilburn refused to take the oath for a third time. The court found Lilburn guilty of contempt for his refusal, and ordered him imprisoned, fined, and tortured.[41]

By 1640 popular opposition to the High Commission brought England dangerously close to a civil war. Finally, reforms were instituted by the Long Parliament, which was dominated by Puritans and common

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35. Trial of Lilburn and Wharton, 3 T.B. HOWELL, *supra* note 33, at 1318.

36. In this regard Lilburn argued: "But if you will ask of [my charge], I shall then answer you, and do answer that for the thing for which I am imprisoned, which is for sending over books, I am clear, for I sent none." *Id.*

37. In Lilburn's words, "You must swear said he. To what? 'That you shall make true answer to all things that are asked of you.' Must I so, sir? but before I swear, I will know to what I must swear." *Id.* at 1320.

38. *Id.* at 1321.

39. Up to the time of Lilburn's trial, refusals to take the oath occurred when the oath was given *before* charges were brought. Thus, since the normal procedure in the Star Chamber was for the presentment by bill of complaint to precede the swearing of the accused, there had rarely been refusals to take the oath in the Star Chamber. In Lilburn's case, however, only a verbal complaint was read as well as the affidavit from Lilburn's coworker who had accused Lilburn (although this affidavit may have served as a substitute for the formal charge). L. LEVY, *supra* note 10, at 275.

40. Trial of Lilburne and Wharton, 3 T.B. HOWELL, *supra* note 33, at 1323; L. LEVY, *supra* note 10, at 275.

41. Trial of Lilburne and Wharton, 3 T.B. HOWELL, *supra* note 33, at 1327.

lawyers. On November 3, 1640, Lilburn was freed.[42]

In 1641 the Government abolished the High Commission[43] and the Star Chamber.[44] The Act that abolished the High Commission also settled the matter of the oath with respect to the remaining, lower ecclesiastical courts. The Act prohibited anyone acting under ecclesiastical authority from subjecting individuals to an oath by which witnesses would either be forced to be their first accusors or would be forced to confess.[45]

B. The Privilege in Common Law Courts

1. History of the Privilege

The situation in the seventeenth century common law courts was different. In these courts no oath was used. It was common practice, however, for the courts to try to obtain confessions from suspects before indictment and arraignment.[46] At trial, questioning of suspects was a significant part of the procedure.[47] The courts prohibited the use of torture to extract confessions, but silence in the face of an incriminating question could be taken as an implication of guilt.[48]

In the 1642 *Proceedings Against the Twelve Bishops*,[49] a common law

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42. *Id.* at 1342-43; L. LEVY, *supra* note 10, at 278-79.

43. The Act for the Abolition of the Court of High Commission (1641), *reprinted in*, S. GARDINER, THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 186-89 (1906).

44. The Act for the Abolition of the Court of Star Chamber (1641), *reprinted in*, S. GARDINER, *supra* note 43, at 179.

45. The Act stated:

> [No ecclesiastical authority] shall *ex officio*, or at the instance or promotion of any other person whatsoever, urge, enforce, tender, give or minister unto any churchwarden, sidesman or other person whatsoever any corporal oath, whereby he or she shall or may be charged or obliged to make any presentment of any crime or offence, or to confess or to accuse him or herself of any crime, offence, delinquency or misdemeanor . . . .

The Act for the Abolition of the High Commission (1641), *reprinted in* S. GARDINER, *supra* note 43, at 186, 188.

46. Levy notes:

> Only the Crown had a right to subpoena witnesses and take their testimony under oath. Sworn testimony was a privilege, for it added immeasurably to the credibility of the witness. Indeed, because sworn testimony was so highly regarded the accused himself was not permitted to testify under oath even if he wanted to.

L. LEVY, *supra* note 10, at 283.

47. *Id.* at 282.

48. *Id.* at 282-83.

49. Y.B. 17 Car. I, pl. 158 (1641), *reprinted in* 4 T.B. HOWELL, *supra* note 33, at 63.

court first recognized the right against self-incrimination.[50] By statute, the bishops, who had always sat in the House of Lords by virtue of their office, were excluded from the Puritan-controlled House.[51] The bishops petitioned the king,[52] alleging that all "laws, orders, votes, resolutions, and determinations" made in their absence were "null, and of none effect."[53] Because of this petition, the House of Commons charged the bishops with high treason.[54] At trial before the House of Lords, the bishops were asked "[w]hether they did subscribe the Petition now read, and whether it was their hand-writing."[55] The bishops refused to answer, arguing that "it was not charged in the impeachment; neither were they bound to accuse themselves."[56] The House of Lords arguably recognized the privilege claimed by the bishops, for they did not force the bishops to answer.

This trial was particularly noteworthy for three reasons. First, since the bishops had already been charged and knew of the evidence against them, the claimed privilege was broader than a privilege against being forced to provide the information upon which the courts would base a charge. Second, the forum in which the right was claimed was a nonecclesiastical court. Third, the right apparently was claimed successfully by particularly unsympathetic plaintiffs; these were the same bishops who had denied the privilege against self-incrimination to the Puritans who now judged them.[57]

The argument that one should not be condemned for refusing to answer incriminating quesions even after charges were brought was especially attractive to religious sects such as the Puritans. When the oath was in use, the Puritans and other religous groups without political power at that time consistently suffered the brunt of that procedure because the Government deemed their beliefs and actions illegal. The Puritans believed that if they answered untruthfully they would be judged by God because they considered perjury to be a sin.[58] On the other hand, if

50. Levy says that the case was "[t]he first sign of respect accorded the right against self-incrimination [in the common law courts]." L. LEVY, *supra* note 10, at 284.

51. Clerical Disabilities Act, *reprinted in* S. GARDINER, *supra* note 43, at 241-42.

52. Proceedings Against the Twelve Bishops (1642), *reprinted in* 4 T.B. HOWELL, *supra* note 33, at 63-69.

53. *Id.* at 69.

54. *Id. See* L. LEVY, *supra* note 10, at 284-85.

55. Proceedings Against the Twelve Bishops, 4 T.B. HOWELL, *supra* note 33, at 76.

56. *Id.*

57. L. LEVY, *supra* note 10, at 285.

58. *Id.* at 284-85.

they answered truthfully, they would certainly be severely punished for acts compelled by conscience.

The press was a primary means of voicing various religious and political views. Parliament sought to stem the tide of expression by enacting seditious literature statutes. John Lilburn was one of the more prolific pamphleteers of the time and was also a vociferous defender of freedom of the press. In 1649, Lilburn was again arrested, indicted, and charged with high treason.[59] The Government tried Lilburn before a jury, eight common law judges, the Lord Mayor of London, the Recorder of London, four sergeants-at-law, and twenty-six other special judges such as city aldermen and members of Parliament.[60] Several pamphlets allegedly authored by Lilburn served as the basis for his charge. Lilburn's defense was that the prosecution had not proved that he was the author. The self-incrimination problem arose when he refused to answer whether the handwriting was his own. The jury eventually acquitted Lilburn. After Lilburn's trial, the privilege against self-incrimination became an established right.[61]

2. Expansion of the Privilege: Current Status in England

In the ensuing decades, the courts expanded the privilege as part of the concepts of fair play and due process of law.[62] In the eighteenth century, the privilege, which originally developed as a protection against compulsion of oral testimony, was extended to protect against the compulsion of incriminating personal papers.[63]

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59. Trial of Lieutenant-Colonel John Lilburn (1649), *reprinted in* 4 T.B. HOWELL, *supra* note 33, at 1269. Levy also provides an entertaining account of the trials of the obstinate John Lilburn. L. LEVY, *supra* note 10, at 271-313.

60. Trial of Lieutenant-Colonel John Lilburn, 4 T.B. HOWELL, *supra* note 33, at 1269; L. LEVY, *supra* note 10, at 301.

61. Levy notes:

> Lilburn had made the difference. From his time on, the right against self-incrimination was an established, respected rule of the common law, or, more broadly, of English law generally. *Examen Legum Angliae: Or the Laws of England*, a book published in 1656, recalled the oath *ex officio* had violated "the Law of Nature," claimed that the *nemo tenefur* maxim was "agreed by all men," discoursed on the soundness of the maxim, cited Nicholas Fuller's *Argument*, and observed that in neither criminal cases at common law nor in chancery cases involving fraud was a man obliged "to confess the truth against himself." The right against self incrimination did not prohibit inquiry nor even incriminating interrogatories, but it did permit a refusal to answer without formal prejudice or penalty.

L. LEVY, *supra* note 10, at 313.

62. *Id.* at 331-32.

63. In Roe v. Harvey, 98 Eng. Rep. 302 (K.B. 1769), in which plaintiff sought to have defendant produce a deed necessary to support his title in ejectment, Lord Mansfield noted that "in a criminal or penal cause, the defendant is never forced to produce any evidence;

Since the time of Lilburn, the privilege against self-incrimination has become axiomatic in English law.[64] Furthermore, it is accepted without discussion that defendants cannot be compelled to produce tangible evidence, including private papers, which incriminate themselves.[65] The English privilege has developed as a rule of evidence while its American counterpart is considered a rule of criminal procedure.[66] The significance of this is that the English rule is generally cited with little or no discussion of its policy underpinnings.[67] Accordingly, one must determine the policies underlying the English rule by considering its history.

The English history reveals that there are two interests served by the privilege. First, there is the interest against cruelty commonly associated with the privilege—a witness' right to be free from being forced to answer questions which will be used against the witness later in a criminal proceeding. Second, there is the right not to have one's privacy violated by being forced to give self-incriminating answers or reveal self-incriminating private thoughts. Clearly, this second interest includes self-incriminating private thoughts committed to paper. The English courts, however, do not formally distinguish between the two interests. By broadly prohibiting the practice of compelling self-incrimination through testimony or production of evidence, the courts implicitly protect the privacy interest. Since the production of any self-incriminating evidence

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though he should hold it in his hands in court." In King v. Purnell, 96 Eng. Rep. 20 (K.B. 1749), the attorney general's request to inspect corporate books was denied because the books were private and granting such a rule would "make a man produce evidence against himself, in a criminal prosecution .... We know of no instance wherein this court has granted a rule to inspect books in a criminal prosecution nakedly considered." *Id.* at 23.

64. *See, e.g., Re* Westinghouse Elec. Corp. Uranium Contract Litigation M.D.L. Docket No. 235 (No. 1), 3 All E.R. 703 (1977), *rev'd on other grounds*, Rio Tinto Zinc v. Westinghouse Elec. Corp., 1 All E.R. 434 (H.L.) (1978), which notes:

> The common law has for centuries held that a person is not bound to answer a question which may render him liable to punishment, penalty or forfeiture.... "It is one of the inveterate principles of English law that a party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture ... 'no one is bound to incriminate himself.' "

Id. (quoting Redfern v. Redfern, All E.R. 524, 528 (1886-90). *See supra* note 63. *See also* 17 HALSBURY'S LAWS OF ENGLAND ¶ 240 (4th ed. 1977).

65. *See, e.g.*, Trust House v. Postelthwaite, 108 J.P. 546 (1944). In Postelthwaite the defendant refused to produce an invoice requested by the prosecution. The magistrate intervened and ordered the documents produced. The defendant was convicted and subsequently appealed. In quashing the conviction and holding the document inadmissible, the appeals court held that the magistrate could not compel production. *Id.* at 13. *See supra* note 63.

66. As an established rule of evidence, the privilege is not a flexible device which can be tailored to serve the interests it represents. The American rule, on the other hand, is more flexible and continues to evolve. *See infra* text accompanying notes 68-176.

67. *See supra* notes 64, 65.

may not be compelled under any circumstances, distinctions need not be made based on privacy, and the need for special treatment is obviated.

III. DEVELOPMENT OF THE PRIVILEGE IN THE UNITED STATES

A. Procedure to Compel Production of Papers

In the United States, production of evidence may be compelled by a subpoena.[68] The Federal Rules of Criminal Procedure provide that failure to comply with a subpoena may be deemed contempt of court.[69] Courts may excuse noncompliance with a subpoena if the party is unable to comply or if the court lacks jurisdiction to issue a subpoena.[70] The potential for abuse of the subpoena process becomes apparent when one considers the number of authorities able to issue subpoenas: grand juries, prosecutors, administrative agencies, and legislative committees.[71]

B. Fifth Amendment Protections Against Compelled Production of Private Papers

1. History

The fifth amendment to the Constitution of the United States provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[72] To understand the intent of the authors of this amendment and the legislature which adopted the amendment,[73] one

68. FED. R. CRIM. P. 17.

69. *See* United States v. Goldfine, 169 F. Supp. 93 (D.C. Mass. 1958), *aff'd*, 268 F.2d 941 (1st Cir. 1959), *cert. denied*, 363 U.S. 842, which noted:

> In a case of alleged criminal contempt for willful failure to comply with a judicial subpoena or order addressed to a defendant requiring him to produce a record . . . the Government must ordinarily prove these six elements of the crime beyond a reasonable doubt: (1) that the Court issued an order for the production at a particular time and place of a record adequately described in the order, (2) that the defendant was served with (or otherwise knew of) the order, (3) that the record existed at the time the order was served, (4) that the defendant had control (or lawful power to acquire control) of the record, (5) that the defendant failed to produce (or cause the production of) the record, and (6) that the defendant acted willfully.

Id. at 98.

70. In subpoena cases the contempt power is used to force compliance and not to punish. 8 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 17.12 (2d ed. 1988).

71. *See* 2 W.R. LAFAVE, SEARCH AND SEIZURE 189 (1978).

72. U.S. CONST. amend. IV.

73. James Madison was the original author of the self-incrimination clause. In House discussion, however, language was added to the clause to restrict its application to criminal courts. L. LEVY, *supra* note 10, at 422-25.

must consider the history of the privilege against self-incrimination in America in the time preceeding the amendment.

By the end of the seventeenth century, the privilege against self-incrimination was tenuously and unevenly established throughout the colonies.[74] An example of the application of the privilege in one jurisdiction is found in the *Trial of Colonel Bayard*.[75] This case illustrates that the privilege included the right not to be compelled to produce self-incriminating documents. The defendant Bayard allegedly had authored addresses accusing Chief Justice Atwood and Lieutenant Governor Nanfan of actions ranging from bribery to oppression. Lieutenant Governor Nanfan arrested Bayard and his confederate Hutchins. Nanfan ordered Hutchins to produce copies of the addresses, but Hutchins refused. He and Bayard were imprisoned and thereafter, were convicted. Bayard's friends in England petitioned the Board of Trade, claiming that the court had attempted to force Hutchins to incriminate himself. The attorney general in England agreed, stating that "it appears by the warrant for committing Hutchins that the Council required him to produce a libell [sic] he is charged to be the author of *which was to accuse himself*."[76] The Privy Council found the convictions illegal. The most important aspect of the case is that, in defending his conduct, Chief Justice Atwood implicitly recognized the privilege and its application to the compelled production of papers. Atwood stated: "But since [Hutchins] was not committed for High treason, as he might have been, and since there wanted no Evidence against him; this, surely may answer the Objection against requiring him to produce Papers which might tend to accuse himself."[77]

Bayard indicates that at the turn of the eighteenth century a prohibition against compelled production of self-incriminating documents was found wherever the privilege against self-incrimination was found. Moreover, as the political and economic systems of the colonies matured, they increasingly reflected English law,[78] which prohibited the compelled production of incriminating papers.[79] By the time of the revolution, the

74. *Id.* at 368.

75. Trial of Colonel Bayard (1702), *reprinted in* 14 T.B. HOWELL, *supra* note 33, at 471. *See* L. LEVY, *supra* note 10, at 379-80 (for history and circumstances surrounding the case).

76. L. LEVY, *supra* note 10, at 380, *citing* IV DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK 954 (E. Callaghan & B. Fernow eds. 1853-87) (emphasis from Levy).

77. L. LEVY, *supra* note 10, at 380, *citing The Case of William Atwood, Esq. (1703)*, in XIII NEW-YORK HISTORICAL SOCIETY, COLLECTIONS 269 (1881).

78. L. LEVY, *supra* note 10, at 368.

79. *See supra* notes 61, 63.

privilege was clearly established and was virtually identical to that of England.[80]

Prior to the signing of the Constitution of the United States, most states had established their own constitutions.[81] Virginia's was particularly important because other states copied it and because, in several respects, it served as a model for the Bill of Rights.[82] Section 8 of Virginia's Declaration of Rights provided that

> in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unananimous consent he cannot be found guilty; *nor can he be compelled to give evidence against himself*; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.[83]

Interestingly, literal interpretation of this language suggests that it prohibited courts from compelling the production of self-incriminating "evidence" other than testimony. The language does not indicate that Virginia's intent was to reduce the self-incrimination protections previously found in the colonies. Since the privilege was then nearly identical to the English privilege[84] which clearly prohibited compelling production of self-incriminating documents,[85] there can be little doubt that Virginia, and the colonies that copied section 8, contemplated a similar prohibition.[86] There were no further changes in the privilege until the adoption of the Bill of Rights.

It is unlikely that James Madison's intent, as demonstrated by his wording of the Bill of Rights, was to change the state of the common law with regard to the privilege against self-incrimination. His papers, however, do not reveal his precise intent in this area.[87] Madison's original proposal for the fifth amendment self-incrimination provision read:

> No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life liberty, or property, without due process of law; nor be obliged to relinquish his

80. *See generally* L. LEVY, *supra* note 10, at 368-404 (for selected cases and discussion).
81. *Id.* at 405.
82. *Id.* at 409.
83. Virginia Declaration of Rights, *reprinted in* L. LEVY, *supra* note 10, at 405-06 (emphasis added by Levy).
84. *See supra* notes 78-80 and accompanying text.
85. *See supra* notes 61, 63.
86. *See also* notes 75-80 and accompanying text.
87. L. LEVY, *supra* note 10, at 423.

property, where it may be necessary for public use, without just compensation.[88]

Madison's use of this language was novel—none of the states had used similar phraseology to define a right against self-incrimination.[89] Despite what this language may suggest, it is likely that Madison contemplated a prohibition against compelling self-incriminating "evidence."

The subsequent proposal, which the Constitutional Convention adopted, provided that the constitutional privilege be confined to criminal cases. John Lawrence of New York suggested this change.[90] In making his suggestion, Lawrence described the substantive provision of this section of the fifth amendment as assuring that "a person shall not be compelled to give evidence against himself."[91] In suggesting that this prohibition be confined to criminal cases, he noted that the amendment would be "a general declaration in some degree contrary to laws passed."[92] Levy suggests that this later comment referred to the Judiciary Act of 1789, which had been passed recently by the Senate.[93] Section 15 of the Judiciary Act empowered the federal courts to compel civil parties to produce their books or papers containing relevant evidence. Prior to its restriction to criminal cases, the fifth amendment could be in conflict with section 15 of the Judiciary Act only if the amendment prohibited the compulsion of papers and documents in both civil and criminal cases. Accordingly, when the House limited the privilege to criminal cases, the ban on compelling the production of self-incriminating papers and documents remained in effect with respect to criminal cases.

2. *Boyd v. United States*

The first important case in the area of compelled production of incriminating papers is *Boyd v. United States*.[94] In *Boyd*, the prosecutor charged the defendant with importing cases of glass into the United States without paying the required duties. The district attorney filed a civil information for forfeiture of the thirty-five cases of plate glass. The

88. 1 ANNALS OF CONG. 434 (J. Gales ed. 1834) (statement of Rep. Madison on June 8, 1789), *quoted in* L. LEVY, *supra* note 10, at 422.

89. L. LEVY, *supra* note 10, at 423.

90. *Id.* at 424-25.

91. 1 ANNALS OF CONG. 753 (J. Gales ed. 1834) (statement of Rep. Lawrence on Aug. 17, 1789), *quoted in* L. LEVY, *supra* note 10, at 424-25.

92. 1 ANNALS OF CONG. 753 ([J. Gales ed. 1834) (statement of Rep. Lawrence on Aug. 17, 1789), *quoted in* L. LEVY, *supra* note 10, at 424-25.

93. L. LEVY, *supra* note 10, at 425-26.

94. 116 U.S. 616 (1886).

action was brought under an act providing that anyone who intended to avoid paying the required taxes when bringing merchandise into the country was guilty of a crime. Under the act, violators could be imprisoned for two years and fined five thousand dollars.[95] The statute also authorized forfeiture upon a finding that the defendant committed the crime.[96] The prosecutor, seeking to prove the quantity and value of the boxes of glass, subpoenaed the defendant to produce the invoices of the boxes of glass. The district judge ordered the invoices produced. The defendant complied with the notice and produced the invoices, but objected to the validity of the notice and the constitutionality of the law. The defendant appealed to the United States Supreme Court.

The Supreme Court did not base its decision solely on the fifth amendment's self-incrimination prohibition. Instead, the Court opted for a more comprehensive approach to the issue. It held that the fourth and fifth amendments should be used in the analysis of the statute. The Court stated:

> It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure.[97]

Having tied the compulsory production of papers to the fourth amendment, the Court continued:

> The principle question, however, remains to be considered. Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such purpose an "unreasonable search and seizure" within the meaning of the Fourth Amendment of the Constitution?[98]

In effect, the Court held that the fifth amendment did not stand on its own. In tying the fifth amendment to the fourth amendment, the Court limited the privilege against self-incrimination, with respect to physical evidence, by the rules applicable to search and seizure cases. Commentators and Supreme Court justices viewed this approach as pro-

95. *Id.* at 617.
96. *Id.*
97. 116 U.S. at 622.
98. *Id.* (emphasis deleted).

tective of civil liberties.[99]

The fourth amendment, the Court said, primarily protects property interests.[100] Thus, the Court implied that a search for property in which the Government had a proprietary interest was permissible, but a search for property over which the Government had no claim was impermissible.[101] The Government's claim could be upheld if possession of the property seized was illegal:

> The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or using them as evidence against him.[102]

This opinion was the precursor of what was later called the mere evidence rule. This rule said that a search for mere evidence of a crime could not be authorized. For the search to be proper, the Government must have some sort of proprietary interest in the item. An example of an appropriate state interest would be if the item was an instumentality of a crime or an item whose posession was illegal.[103] The Court did not explicitly find that the fifth amendment also protects a property interest in physical evidence. The Court, however, did link the fifth amendment to the fourth amendment, which was found to protect property rights. Thus, a search for, or compelled production of, physical evidence violates the fourth amendment if the Government does not have a proprietary interest in the object item. To support the proposition that the fourth amendment protects property rights, the Court cited the English case of *Entick v. Carrington*,[104] which held that search and seizure decisions were to be based on property law. *Entick* was primarily a search and seizure case, however, and was not a self-incrimination case.[105] Although *Boyd* used the case as authority for intertwining the two distinct issues, this was not the holding of the *Entick* case.

Entick does, however, provide support for the mere evidence rule. In *Entick*, the plaintiff brought an action for trespass; breaking and en-

99. *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting) ("Boyd v. United States [is] a case that will be remembered as long as civil liberty lives in the United States.").

100. 116 U.S. at 623-24.

101. *Id.*

102. *Id.* at 623.

103. *See infra* notes 113-127 and accompanying text.

104. 116 U.S. at 623; Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765), *reprinted in* 19 T.B. HOWELL, *supra* note 33, at 1029.

105. *Entick*, 19 T.B. HOWELL, *supra* note 33, at 1030, 1063-74.

tering the plaintiff's house; breaking open chests, drawers, and boxes; and reading the private papers and books found inside.[106] The defendant police officers did not deny the allegations. Instead, they argued that their actions were justified because the search was pursuant to a warrant.[107] The opinion of the court, delivered by Lord Chief Justice Camden, dealt with several issues in assessing the legality of the search. The court based its holding on property law; a search is a trespass which can be excused if justified.[108] A search would be justified if the searching party held a proprietary interest in the item seized.[109]

The court in *Boyd*, however, relied upon tougher language from *Entick*. In *Entick*, the plaintiff argued that

> no power can lawfully break into a man's house and study to search for evidence against him. This would be worse than the Spanish inquisition; for ransacking a man's secret drawers and boxes, to come at evidence against him, is like racking his body to come at his secret thoughts.[110]

Lord Camden agreed:

> Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shewn, where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action.
>
> In the criminal law such a proceeding was never heard of; and yet there are some crimes, such for instance as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction.
>
> Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say.
>
> It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the

106. *Id.* at 1030.
107. *Id.* at 1030-32.
108. *Id.* at 1066.
109. *Id.* at 1067. *See infra* notes 113-127 and accompanying text.
110. *Entick*, 19 T.B. HOWELL, *supra* note 33, at 1038.

guilty.[111]

The quoted section from *Entick*, however, was merely dicta used to support the holding that the search was illegal. The rule from *Entick* is that a search is illegal if it violates property law, and that the state violates property law if it searches for or seizes an item in which it has no proprietary interest.

Entick indicated that the "search" failed not only because it violated property laws, but arguably because it also violated self-incrimination prohibitions. When the *Boyd* court quoted the language from *Entick* to buttress the previous argument that compelled self-incrimination is a search, the Court apparently held that compelled self-incrimination was a search that was unconstitutional because it violated the prohibition against self-incrimination!

The *Entick* court described a self-incrimination prohibition so broad that it touches a search and seizure situation. Nevertheless, the search complained of in *Entick* was found to be illegal because of property law, not because of the self-incrimination prohibition. The *Boyd* court, however, described a self-incrimination provision so weak that it could not by itself prohibit the very thing it had been understood to prohibit—the compulsion of incriminating evidence.

One important idea stands out in both *Boyd* and *Entick*—the importance and sanctity of private papers. In *Boyd*, the Supreme Court quoted *Entick* with approval on this point:

> Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass . . . .[112]

As discussed previously, the effect of the *Boyd* analysis was that, as regards physical evidence, the fourth and fifth amendments were intertwined. Accordingly, study of the developments in the application of the fourth amendment is necessary to understand the Court's interpretation of the fifth amendment. Even though the dicta in *Boyd* suggested a prohibition against paper searches when the government had no proprietary interest, it was not until *Gouled v. United States*[113] that the Court ex-

111. *Id.* at 1073.

112. Boyd v. United States, 116 U.S. 616 (1886) (quoting *Entick*, 19 T.B. HOWELL, *supra* note 33, at 1066.

113. 255 U.S. 298 (1921).

tended this proposition to prohibit the seizure of any evidence over which the government had no proprietary interest.

Gouled concerned the admission into evidence of documents searched for and seized pursuant to a warrant. The Court held that it could not authorize searches of a home or office solely for the purpose of obtaining evidence to be used in a criminal prosecution. A search might be authorized, however, if the state has an interest in the property to be seized, or a right to possess it, or if its possession by individuals is illegal.[114] The Court added, "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized . . . ."[115] Since *Boyd* had linked the fourth and fifth amendments, at least with regard to physical evidence, these rules were presumably equally applicable to the fifth amendment protections for physical evidence.

The lack of protection for private papers, then, must be analyzed in the context of the Court's holding. The *Gouled* case turned on the Court's view of the proprietary interest involved. The case merely stands for the proposition that there is no special *proprietary* sanctity in papers. *Gouled* is especially important because it rejects any notion of a privacy interest.[116]

3. Recent Cases: The Modern Fifth Amendment Protections

In *Schmerber v. California*,[117] the Supreme Court further limited the privilege against compelled production of self-incriminating evidence. In *Schmerber*, the defendant was arrested at a hospital while receiving treatment for injuries suffered in a recent automobile accident. Over his objection, a blood sample was extracted from Schmerber at the direction of a police officer. A chemical analysis of the blood sample revealed a blood-alcohol level which indicated that Schmerber was legally intoxicated. The judge admitted the evidence of the chemical analysis at trial, and Schmerber was convicted of driving while under the influence of alcohol.[118] The defendant argued that the extraction of blood violated his privilege against self-incrimination under the fifth amendment.[119] Writ-

114. *Id.* at 309.

115. *Id.*

116. *See* Note, *The Life and Times of Boyd v. United States (1886-1976)*, 76 MICH. L. REV. 184, 190 (1977). Since there is no difference between documents and mere chattels, the privacy protection is entirely a proprietary interest.

117. 384 U.S. 757 (1966).

118. *Schmerber*, 384 U.S. at 759.

119. *Id.*

ing for five members of the Court, Justice Brennan found that the privilege against self-incrimination protects a witness only from being compelled to testify against himself or to provide the state with evidence of a "testimonial or communicative nature."[120] Justice Brennan found that Schmerber's blood sample was not evidence of such a nature.[121]

A strict interpretation of the words of the fifth amendment might also have allowed the court to admit the evidence. Schmerber may have been forced to produce self-incriminating *evidence*, but arguably he was not forced to "be a witness against himself."[122] Brennan recognized this argument but declined to follow it, noting:

> It could not be denied that in requiring petitioner to submit to the withdrawal and chemical analysis of his blood the state compelled him to submit to an attempt to discover evidence that might be used to prosecute him for a criminal offense. . . . The critical question, then, is whether petitioner was thus compelled "to be a witness against himself."[123]

In a footnote, Brennan continued: "Many state constitutions, including most of the original Colonies, phrase the privilege in terms of compelling a person to give 'evidence' against himself. But our decision cannot turn on the Fifth Amendment's use of the word 'witness.' "[124]

In support of the proposition that "evidence" and "witness" referred to the same prohibition of testimony or communications, and not literally "evidence," Brennan quoted *Counselman v. Hitchcock*:

> [A]s the manifest purpose of the constitutional provisions, both of the states and the United States, is to prohibit the compelling of testimony of a self-incriminating kind from a party or witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however, differently worded should have as far as possible the same interpretation . . . .[125]

The Court in *Counselman*, however, cited *Boyd* with approval, and quoted several passages from that case which specifically held that the compelled production of self-incriminating private papers was unconsti-

120. *Id.* at 761.

121. *Id.*

122. *See supra* text accompanying notes 81-89.

123. *Schmerber*, 384 U.S. at 761.

124. *Id.* at 761-62 n.6.

125. Counselman v. Hitchcock, 142 U.S. 547, 584-85 (1892), *quoted in Schmerber*, 384 U.S. at 761-62 n.6.

tutional.[126] Thus, the "same interpretation" contemplates a privacy protection for these private papers.

In support of the assertion that the fifth amendment prohibits only compelled self-incrimination using "testimonial" or "communicative" evidence, Brennan cited two lines of precedent. First, to support the proposition that precedent required the testimonial communication distinction, Brennan cited *Holt v. United States*.[127] The *Holt* court held that compelling the accused to submit to a demand to model a blouse did not violate the privilege. Brennan further cited federal and state cases which found no fifth amendment violation in compelling defendants to submit to fingerprinting, photographing, or measurements; to write or speak for the purpose of identification; or to appear in court, stand, walk, or make a particular gesture.[128]

Second, as an example of when self-incriminating evidence is privileged, Brennan quoted *Miranda v. Arizona*:

> All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load" . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.[129]

By alluding to the Court's previous use of the privilege in a forced confession case, Brennan implied that this sort of communication is the sort which is protected by the fifth amendment.

Brennan claimed that the quoted passage "implicitly recognizes . . . [that] the privilege has never been given the full scope which the values it helps to protect suggest."[130] But the passage from *Miranda* does not suggest that the privilege be limited to compelled oral testimony. Instead, it suggests that the policy of the fifth amendment requires, at the very least, that evidence against defendant not be "compelled from his own mouth." In fact, *Miranda* argued for a fifth amendment with broad

126. *Counselman*, 142 U.S. at 580-81.

127. 218 U.S. 245 (1910).

128. *Schmerber*, 384 U.S. at 764 (citing the cases collected in 8 J. WIGMORE, *supra* note 12, § 2265).

129. Miranda v. Arizona, 384 U.S. 436, 460 (1966), *quoted in Schmerber*, 384 U.S. at 762 (citations omitted).

130. *Schmerber*, 384 U.S. at 762-63.

protections. *Miranda* specifically cited procedures in England and other countries,[131] noting that

> [the United States should] give at least as much protection to these rights as is given in the jurisdictions described [including England]. We deal in our country with rights grounded in a specific requirement of the Fifth Amendment of the Constitution, whereas other jurisdictions arrived at their conclusions on the basis of principles of justice not so specifically defined.[132]

The result of *Schmerber* did not differ from the results of the earlier tests, since Brennan specifically found that "communications" includes private papers.[133] Nevertheless, the Court's test in *Schmerber* is very different from the English test. First, in *Schmerber*, the privilege is becoming a rule of criminal procedure. As such, it is a fluid and constantly evolving right which is weighed and balanced as the circumstances vary. As the Court pointed out, "There will be many cases in which such a distinction [between communications or testimony and real or physical evidence] is not readily drawn."[134] The privilege in England is a common-law rule that, over the years, has developed into a rule of evidence rather than a rule of criminal procedure.

In *Fisher v. United States*,[135] and *United States v. Doe*,[136] the Supreme Court limited the parameters of "communication." In *Fisher*, the Court held that the fifth amendment did not protect the contents of documents prepared by a person other than the defendant. The Court upheld a summons that required the defendant's attorney to produce documents prepared by the defendant's accountants. The Court found that the documents would be privileged in the hands of the attorney if they would have been protected while in the hands of the defendant.[137] The contents of the documents, however, would be unprotected in any case since the privilege only protects a person from being incriminated by his own "compelled testimonial communications." The Court found no protection under the facts of the case since the accountant's workpapers were not the taxpayer's. Since the taxpayer did not prepare the workpapers, they contained no testimonial declarations by him.[138] Further, since the preparation was *voluntary*, the papers simply did not

131. *Miranda*, 384 U.S. at 486-89.
132. *Id.* at 489-90.
133. *Schmerber*, 384 U.S. at 763-64.
134. *Id.* at 764.
135. 425 U.S. 391 (1976).
136. 465 U.S. 605 (1984).
137. *See Fisher*, 425 U.S. at 396.
138. *Id.* at 409.

"contain compelled testimonial evidence, either of the taxpayers or of anyone else."[139] Arguably, the holding adequately protected the defendant's privacy interest, since the papers could not have contained communications that revealed the mind of the *defendant*. In a footnote, however, the Court added, "The fact that the documents may have been written by the person asserting the privilege is insufficient to trigger the privilege."[140] In addition, the Court stated that:

> The Framers addressed the subject of personal privacy directly in the Fourth Amendment. They struck a balance so that when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and seize will issue. They did not seek in still another Amendment—the Fifth—to achieve a general protection of privacy but to deal with the more specific issue of compelled self-incrimination.[141]

The Court held, however, that the act of production may involve communicative aspects regardless of the contents. The production of papers might be communicative because compliance with a subpoena concedes that the papers produced are in existence, that they are in the possession and control of the subpoenaed party, and that they are the papers requested.[142] In *Fisher*, however, the Court found that these tacit concessions did not rise to the level of testimony within the protection of the fifth amendment, since the Government did not rely on the testimonial aspects of the act of production.[143]

Thus, under the reasoning of *Fisher*, there is no protection for the most private of papers. Since the fifth amendment contains no distinct privacy protection, the contents of private papers are unprotected as long as the state does not compel the writing of the papers. Furthermore, the testimonial aspects which the Court found in the actual production of papers provide protection in very few situations.

Justice Brennan concurred in the judgment, but wrote separately because he feared that the opinion would sweep away fifth amendment protections for purely private papers.[144] Brennan argued that privacy is a "central purpose" of the privilege against self-incrimination, and not merely a "byproduct" of other protections.[145] Brennan argued that there

139. *Id.* at 409-10.
140. *Id.* at 410 n.11.
141. *Id.* at 400.
142. *Id.* at 410.
143. *Id.* at 410-11.
144. *Id.* at 414-15.
145. *Id.* at 416.

is a zone of privacy protected by the fifth amendment, including certain "books, papers, and writings."[146] If an article is within the zone, the state cannot compel its production. The fifth amendment, he argued, protects testimonial evidence in which there is a "reasonable expectation of privacy."[147] One relevant factor in determining whether an individual has a reasonable expectation of privacy in a paper is the "degree to which the paper holder has sought to keep private the contents of the papers he desires not to produce."[148] Under this analysis, "Papers in the nature of a personal diary are *a fortiori* protected under the privilege."[149]

Brennan correctly pointed out that there are privacy implications when production of self-incriminating papers is compelled. The *Fisher* majority, however, found that separate interests were dealt with separately by the authors of the fourth and fifth amendments—privacy is explicity protected by the fourth amendment and may be protected only incidentally by the fifth amendment.[150]

United States v. Doe[151] presented the question addressed in the *Fisher* footnote. The respondent in *Doe* was the owner of several sole proprietorships that were served with five subpoenas during the course of an investigation into corruption in the awarding of county and municipal contracts. The subpoenas requested the production of a list of virtually all the business records, bank statements, and cancelled checks of two of the respondent's companies. The respondent filed a motion in federal district court to have the subpoenas quashed. With respect to the respondent's papers that were not required by law to be kept, the district court granted the motion on the grounds that the act of production amounted to testimony regarding the existence, possession, and authenticity of the requested documents.[152] The court of appeals affirmed. The Supreme Court affirmed in part, reversed in part, and remanded the case.[153]

146. *Id.* at 415, 424.
147. *Id.* at 424.
148. *Id.* at 425.
149. *Id.* at 427.
150. In this regard the Court stated:

> We cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment. We adhere to the view that the Fifth Amendment protects against "compelled self-incrimination, not [the disclosure of] private information."

Id. at 401-02 (quoting United States v. Nobles, 422 U.S. 225, 233 n.7 (1975)).
151. 465 U.S. 605 (1984).
152. *Id.* at 611-12.
153. Justice Powell delivered the majority opinion, and Justice O'Connor filed a concurring

The *Doe* Court noted that *Fisher* expressly declined to answer whether the fifth amendment protects the contents of an individual's tax records that are in his possession. The Court categorically rejected the argument that the contents of documents are privileged if the creation of the documents was not compelled.[154]

The Court then addressed the issue previously examined in *Fisher*: whether the act of producing the papers constituted testimony. The Court refused to overturn the finding of the district court that the act of producing the documents involved testimonial self-incrimination.[155] The Court further noted, however, that production of the documents could have been compelled by granting immunity with respect to the testimonial aspects of the production.[156]

The *Doe* approach was mechanical in the sense that the Court applied the rules of *Fisher* with no discussion of policy underpinnings. The Court merely noted, "The rationale underlying our holding in *Fisher* is . . . persuasive here."[157] The concurring opinions, however, went further. Justice O'Connor concurred separately in order to express her opinion that "the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind."[158]

Justice Marshall, with whom Brennan joined, concurred with the majority's opinion that the production of documents could not be compelled without a statutory grant of immunity. In their view, however, the Court did not need to consider whether there are any fifth amendment protections for the contents of private papers. They argued that the papers at issue were business records, and "the case presented nothing remotely close to the question that Justice O'Connor eagerly poses and answers."[159] Business records, Marshall argued, involve privacy concerns less than do personal diaries or other personal papers.[160]

To date, the Court has not directly considered whether there is any fifth amendment privacy protection for nonbusiness papers. Language from *Fisher* and *Doe*, however, indicates that any fifth amendment privacy protection is merely incidental to the main purpose of the fifth amendment. Since the reasoning of *Fisher* and *Doe* is that contents of

opinion. Justice Marshall concurred in part, dissented in part, and filed an opinion in which Justice Brennan joined. Justice Stevens concurred in part and dissented in part.

154. *Id.* at 610-12.
155. *Id.* at 617.
156. *Id.*
157. *Id.* at 610.
158. *Id.* at 618.
159. *Id.* at 619.
160. *Id.*

documents are unprotected if their creation was voluntary, it is likely that Justice O'Connor's view[161] represents the majority in this regard.

C. Fourth Amendment Protections

In *Oklahoma Press Publishing Co. v. Walling*,[162] the Supreme Court established the fourth amendment test for subpoenas of papers. In that case, the Federal Wage and Hour Administrator subpoenaed the business records of Oklahoma Press in order to determine whether Oklahoma Press was subject to the minimum wage requirements and if so, whether there was a violation of the requirements. The Administrator issued the subpoenas pursuant to the enforcement provisions of section 9 of the Federal Trade Commission Act. Section 9 provides that, for authorized investigations, the Commission or its agents shall have access to and the right to copy "any documentary evidence of any person, partnership, or corporation being investigated or proceeded against," and the power, pursuant to subpoena, to require "the attendance and testimony of witnesses and production of all such documentary evidence relating to any matter under investigation."[163] Oklahoma Press argued that this procedure violated the fourth and fifth amendments.

The Court quickly dispensed with the fifth amendment argument by noting that the fifth amendment provides no protection for a corporate officer against compelled production of corporate records.[164] With regard to the fourth amendment, Oklahoma Press argued that the subpoena would allow the Administrator to "conduct general fishing expeditions into [the corporation's] books, records and papers, in order to obtain evidence that the corporation violated the Act."[165] Oklahoma Press also argued that the subpoena violated search and seizure rules since the search would be done with no prior charge or complaint; the purpose was to secure information upon which to base a charge.[166]

The Court found, however, that the subpoena presented no question of actual search and seizure. The opinion stated:

> No officer or other person has sought to enter petitioner's premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity

161. *See supra* note 158 and accompanying text.
162. 327 U.S. 186 (1946).
163. 15 U.S.C. § 49 (1982).
164. *Oklahoma Press*, 327 U.S. at 196.
165. *Id.* at 195.
166. *Id.*

to present objections, which in fact were made.[167]

In finding that there was no search, the Court indicated that the fourth amendment concern for privacy primarily involved the corporation's interest in having its place of business free from the intrusion that occurs during a search. The Court did not discuss any privacy interest that Oklahoma Press may have had in the papers themselves.[168]

In *Oklahoma Press*, the Supreme Court outlined the fourth amendment protections that are available in the case of subpoenas of papers. The Court held that one does not need to satisfy the safeguards surrounding the issuance of a search warrant. Thus, a specific charge need not be made, nor must there be a complaint of a violation of law. Furthermore, the requirement that a search warrant be issued only upon a showing of "probable cause, supported by Oath or affirmation"[169] is satisfied in the case of a subpoena if the subpoena is reasonable. The Court found that there are three considerations when determining whether a subpoena is reasonable: the subpoena cannot be too broad or indefinite,[170] the agency that issues the subpoena must be authorized to make the inquiry, and the materials requested must be relevant to the inquiry.[171]

On its face, the three-part test from *Oklahoma Press* does not address privacy concerns. Furthermore, the Court held that the fourth amendment search and seizure rules that protect privacy are inapplicable to subpoenaed documents.[172] Nevertheless, thirty years later, the *Fisher* court held that the fifth amendment did not protect against the disclosure of private information since, "The Framers addressed the subject of personal privacy directly in the Fourth Amendment."[173] Read together, *Fisher* and *Oklahoma Press* seem to bar any consideration of privacy concerns when production of documents is compelled by subpoena.

Oklahoma Press, however, must be read within its context. The *Oklahoma Press* Court gave no consideration to privacy concerns because there was no privacy argument presented. The Court noted that the papers were of "a corporate character" and added that, "Historically

167. *Id.*

168. Perhaps the privacy interest in these papers did not merit discussion because of the reduced privacy expectation that a corporation has in such papers.

169. U.S. CONST. amend. IV.

170. The Court stated that "specification of the documents to be produced [must be] adequate, but not excessive, for the purpose of the relevant inquiry." *Oklahoma Press*, 327 U.S. at 209. This inquiry varies according to the purpose and scope of the investigation.

171. *Id.*

172. *See id.*

173. *See supra* note 141 and accompanying text.

private corporations have been subject to broad visitorial power . . . [and] it long has been established that Congress may exercise wide investigatorial power over them."[174] Furthermore, in *United States v. Morton Salt Company*,[175] the Supreme Court said that "corporations can claim no equality with individuals in the enjoyment of a right to privacy."[176] Thus, the *Oklahoma Press* test particularly concerned subpoenas of business papers for which there is a much lower degree of privacy expectation. *Doe* and *Fisher* also considered business papers. Perhaps the present tests do not include a privacy inquiry because such a situation has never been presented to the Supreme Court.

IV. A COMPARISON OF THE ENGLISH AND AMERICAN RULES

The most illuminating comparison of the English "evidence" approach and the American "criminal procedure" approach comes from considering the ability to compel production of three types of papers: (1) papers regarding matters of public record, (2) business or tax records, and (3) intimately private papers.

The broad English rule prohibits the compelled production of papers regarding matters of public record, but the American rule allows the compelled production of such documents. Of the two interests of cruelty and privacy, only the former is involved if the state compels production of papers of this type. In the same situation, the English rule is a blunt instrument, since the interests militating against the production of such papers are minimal. Nevertheless, since these types of papers are easily acquired by other means, the state's interest in procuring evidence from the defendant is also minimal. Thus, although the approaches are very different, the results are basically the same—the evidence will be obtained and used against the defendant.

Doe presented the situation in which the state tries to compel the production of business or tax records. In such a case recognizable privacy considerations exist, but these considerations do not rise to the level of the interest in intimately private papers. As a result of *Doe*, American courts allow the production of the papers to be compelled. The English approach prohibits the compelled production of these papers.

The final situation is when production of intimately private papers is compelled. Again, English courts prohibit compelled production of these

174. *Oklahoma Press*, 327 U.S. at 204.
175. 338 U.S. 632 (1950).
176. *Id.* at 652. *See* 2 W.R. LAFAVE, *supra* note 71, at 211.

papers. The American rule is not as clear. This Note proposes that privacy considerations be applied to both the second and third situations.

V. PROPOSALS

The comparison above reveals that, as regards privacy, the single English rule is a blunt instrument that perhaps protects too much. Since there are two interests implicated in forced production, two tests should be used to determine whether the compelled production is objectionable. This Note proposes that a fourth amendment probable cause test, as well as a fifth amendment self incrimination test, be applied in such circumstances. The interests implicated in the compelled production of private papers touch both the fourth and fifth amendments, but the amendments are not intertwined and neither are the interests they protect. This was the shortcoming of the reasoning in *Boyd*;[177] in tying the amendments together their individual protections were bound to suffer. If the Supreme Court isolates the protected interests, however, the protections can be tailored more closely to the interests served by the Bill of Rights.

When production of private papers is compelled, the fifth amendment applies, but the privacy aspect of the fourth amendment also should be involved. The Supreme Court has not adequately addressed the privacy concerns. *Oklahoma Press*, which provides the current test for subpoenas, only protects against the burdens of compliance with subpoenas.[178] This protection is an appropriate fourth amendment concern, but it should not be the exclusive fourth amendment privacy concern. There is no reason that the *Oklahoma Press* test can not coexist with search and seizure rules regarding privacy. The Supreme Court has not addressed the intrusions that occur when private papers are searched after their production has been compelled. There can be little doubt that opening the cover, turning the pages, perusing through the words, or otherwise exposing the contents of papers containing the author's most intimate thoughts violates a reasonable expectation of privacy. This violation demands application of the probable cause safeguards that surround the fourth amendment. Arguably, the same privacy protection is not present in the case of business or tax documents, but this should be determined by application of the same rules.

In the case of searches and subpoenas, the privacy intrusions are essentially the same, but they occur in a different manner. On the one hand, a subpoena is less intrusive because police do not search desks and

177. *See supra* text accompanying notes 94-112.
178. *See supra* text accompanying notes 160-76.

drawers while armed with a subpoena. Moreover, the legality of a subpoena may be challenged before documents are produced. Searches and seizures pursuant to a warrant may not be challenged in advance. On the other hand, if a specific item is subpoenaed, privacy is protected less because the item cannot be hidden or otherwise made difficult to find, as in the case of a search.

Under the proposed test, only if the state can establish the required level of cause may it obtain the private papers by a search pursuant to a warrant or by compelled production pursuant to a subpoena. The level of cause required for either, however, must be the same. A lower standard of cause for subpoenas than for searches does not adequately address the privacy intrusions.

Applying the probable cause test would satisfy the *Schmerber* majority, which was concerned that the production of "communications" not be compelled.[179] The proposed test would make unnecessary some of the fine distinctions a court must make when it decides whether evidence is testimonial. Furthermore, under this test the *Fisher* majority's contention that the fifth amendment only "incidentally" protects privacy is unaffected.[180]

VI. CONCLUSION

The examination of the common history of the privilege against self-incrimination in England and the United States reveals two distinct interests. First, there is the interest in not cruelly being forced to incriminate oneself. Second, there is the privacy aspect of being forced to provide self-incriminating private information.

It is the first interest upon which courts in both countries have focused. In broadly defining the situations in which the interest against cruelty is to be protected, the English courts have provided broad protection for the privacy interest. This broad protection of the interest against cruelty bars compelled production of incriminating private papers. The United States Supreme Court, however, has isolated the two interests, and does not specifically prohibit compelled production of incriminating private papers.

In the United States, the fifth amendment protects one from being forced to incriminate oneself. The Supreme Court has defined this protection narrowly to include only an incidental protection of privacy interests. Privacy interests, the Court has held, are protected by the fourth

179. *See supra* text accompanying notes 120-33.

180. *See supra* note 150 and accompanying text.

amendment. Generally, the Court has applied search and seizure rules to protect this interest. In the case of subpoenaed documents, however, the Court has determined that the fourth amendment only protects against burdensome subpoenas. The test used by the Court has no privacy element.

Thus, intimately private papers are inadequately protected from production pursuant to subpoenas. This Note proposes that opening the cover, turning the pages, and otherwise exposing the contents of such papers be treated as a search, requiring probable cause and other fourth amendment privacy protections. The privacy interest would be protected by such a requirement because, if the level of cause required for a search of the papers were established, the papers could also have been obtained by a search of the premises in which the papers were located.